No. 245

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In the Supreme Court of the United States

OCTOBER TERM, 1966.

UTICA MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

MERLE D. VINCENT, JR., REGIONAL DIRECTOR OF THE THIRD REGION OF THE NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. _____

UTICA MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, and THE HONORABLE STEPHEN W. BRENNAN, SENIOR JUDGE OF SAID DISTRICT COURT,
Respondents.

MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS

Misc. No. _____

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June 12, 1967

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No.

UTICA MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

MERLE D. VINCENT, JR., REGIONAL DIRECTOR OF THE THIRD REGION OF THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Utica Mutual Insurance Company, a domestic mutual insurance corporation organized under the laws of the State of New York, prays that a writ of certiorari issue to review a judgment entered by the United States Court of Appeals for the Second Circuit on March 14, 1967, or in the alternative that this Court grant Petitioner's motion for leave to file a petition for a writ of mandamus to the United States District Court for the Northern District of New York, and to The Honorable Stephen W. Brennan, Senior Judge of said District Court (p. 1a, *infra*).

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Second Circuit is printed as Appendix A hereto and was not reported at the time of the printing of these petitions.

The Memorandum Decision and Order of the District Court appears in the Joint Appendix filed in the Circuit Court of Appeals (pp. 9-15) and in Appendix B hereto. It was not reported.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered March 14, 1967 (Record p. 50). Petitioner did not seek a rehearing in the court below. The jurisdiction of this Court to issue a writ of certiorari to the Court of Appeals is invoked under 28 U.S.C. Sec. 1254(1).

The jurisdiction of this Court to issue a writ of mandamus to the District Court is invoked under 28 U.S.C. Sec. 1651(a).

QUESTIONS PRESENTED.

1. Are the due process requirements of the Fifth Amendment to the Constitution violated by a statute which provides that an administrative tribunal deciding a case without having heard the witnesses is, in every case, prohibited from receiving any report, recommendation or the conclusions of the officer or employee who heard the witnesses, including a report, recommendation or conclusions as to credibility and demeanor of the witnesses and conflicts in the evidence?

2. If the answer to Question No. 1 is in the affirmative, are these constitutional requirements applicable to the hearings required in representation cases before the Na-

tional Labor Relations Board under Section 9(c)(1) of the National Labor Relations Act, as amended, 29 U.S.C. Sec. 159(c)(1)?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The principal statute involved is 29 U.S.C. Sec. 159(c)(1), and in addition, with respect to Petitioner's motion for leave to file a petition for a writ of mandamus, 28 U.S.C. Sec. 2282, both of which statutes are set forth in Appendix C.[1] The constitutional provision involved is the Fifth Amendment to the Constitution and is also set forth in Appendix C.

STATEMENT OF THE CASE.

This action instituted in the District Court for the Northern District of New York challenges the constitutionality of a provision of Section 9(c)(1) of the National Labor Relations Act as amended (29 U.S.C. Sec. 159(c)(1)) relating to the conduct of representation hearings required to be held by the National Labor Relations Board for the purpose of determining the unit appropriate for purposes of collective bargaining. The section provides that upon the filing of a petition by a union seeking certification as the exclusive bargaining agent of a unit of employees of an employer, the Board, "if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice."

The section further provides that "Such hearing may be conducted by an officer or employee of the regional office, and *he shall not make any recommendations with respect thereto.*" (Italics supplied.) It is this italicized

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[1] 29 U.S.C. Secs. 159(a) and 159(b) are also set out in pertinent part in Appendix C for the convenience of the Court.

provision which the Petitioner contends is unconstitutional because it results in a denial of procedural due process to the Petitioner required by the Fifth Amendment to the Constitution. The provision prohibits, even in cases involving substantial issues of credibility and material conflicts in the evidence, which were assumed to be present in this case, the officer or employee who hears the evidence from making any recommendations to the deciding tribunal which has not heard the witnesses.

Petitioner's suit was filed after the Regional Director of the Third Region of the National Labor Relations Board served a notice of representation hearing as a result of a petition filed by the Communication Workers of America, AFL-CIO, seeking certification for a unit of Petitioner's employees at its main office in New Hartford, New York. The complaint sought a declaratory judgment of invalidity and also an injunction to restrain further proceedings in the Board case. With respect to the request for an injunction Petitioner also moved for the convocation of a 3-judge panel pursuant to 28 U.S.C., Sec. 2282.

The District Court denied Petitioner's motion for the convocation of a 3-judge court and dismissed the action. Petitioner thereafter appealed to the Court of Appeals of the Second Circuit. The decision of the District Court was affirmed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

I. The Court of Appeals in this Case Decided Important Questions of Federal Law Which Have Not Been, But Should Be, Settled by This Court.

The constitutionality of the provision of the Act here challenged has not previously been passed upon by this Court, which in itself presents a federal question of substantial importance and one which should be decided by this Court.

In addition the two questions relating to the determination of the validity of the provision involve most important issues of federal law, namely: (a) the application, and the extent thereof, of the requirement of procedural due process and a fair hearing to administrative hearings; and (b) the specific application of the constitutional requirement of due process to representation hearings required by the National Labor Relations Act, as amended.

A. The Application of Procedural Due Process to Administrative Hearings.

There have been various cases which have considered and passed upon whether or not as a constitutional requisite a deciding administrative tribunal which did not in a particular case hear the evidence and observe the witnesses must obtain recommendations or conclusions of a hearing officer, at least as to issues of credibility and conflicts in testimony. The cases have not always been uniform in result.

In state court cases, although there are some which have held that a deciding tribunal need not hear the witnesses or receive a report, *Knapp* v. *State Industrial Commission,* 154 P.2d 964 (Okla., 1944), the more general rule appears to be as stated in *Crow* v. *Industrial Commission,* 140 P. 2d 321 (Utah, 1943, concurring opinion):

> "What is required to meet the demands of due process, that is of a full and fair hearing, is that he who observes the witnesses and listens to the evidence must transmit his observations or conclusions to those who are to decide." (p. 326)

See, also, *Radaca* v. *U. S. Smelting & Mining Co.,* 158 P. 2d 540 (Ariz. 1945); *Shawley* v. *Industrial Commission,* 114 N.W. 2d 872 (Wisc. 1962).

Federal courts of appeal have also reached conflicting results.[2] In *S. Buchsbaum & Co.* v. *FTC,* 153 F.2d 85 (C.A. 7, 1946), the Court held[3] that the failure of the Federal Trade Commission to order a trial *de novo* before a second examiner after the first examiner died during the hearing violated due process,[4] while in *NLRB* v. *Stocker Mfg. Co.,* 185 F.2d 451 (C.A. 3, 1950) the Court held that in a similar situation involving an NLRB examiner there

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[2] The conflicts between the courts of appeal as a separate reason for granting the writ of certiorari is discussed, *infra,* under point II.

[3] In what was described as an "able opinion" by *Wigmore, Evidence,* 3rd Ed., Sec. 946, 1946 Pocket Supp., Note 1 to p. 498.

[4] Cf. also *Smith* v. *Dental Products Co.,* 168 F.2d 516 (C.A. 7, 1948) and *Federal Deposit Insurance Corporation* v. *Siraco,* 174 F.2d 360 (C.A. 2, 1949).

was not a violation of due process.[5] The Court of Appeals in the instant case followed the decision in the *Stocker* case and made no reference to the *Buchsbaum* case.

This Court has not had before it and has not therefore decided whether or not the failure of a deciding tribunal to have a report, recommendation or the conclusions of a hearing officer in a particular case violated due process.[6] Although this Court granted certiorari in the *Buchsbaum* case, the appeal was dismissed upon waiver of error by the company.[7] And certainly this Court has not passed upon the principal issue involved here of the constitutional validity of a broad and absolute statutory proscription removing all discretion from the courts and the administrative agency as to the necessity or advisability of the deciding tribunal receiving recommendations or conclusions from the hearing officer.

Two cases, however, which are somewhat analogous are *Morgan* v. *U.S.*, which was before this Court on four

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[5] The *Stocker* case was criticized by Profesor Davis in his *Administrative Law Treatise*: "Perhaps the most important federal case of the 1950's which is out of line with the usual principle is *NLRB* v. *Stocker Manufacturing Co.* . . . the authority of which is weakened by the court's questionable assumption that the Examiner in the *Mackay* case made no report to the Board, and by the Court's failure in relying upon the *First Morgan* case to note that the Supreme Court said nothing about making findings without any knowledge of the demeanor of witnesses." Vol. 2, Section 11.18, pp. 115-116.

[6] In two cases involving National Labor Relations Board decisions, the Board decisions were affirmed although a report from the Trial Examiner had not been received by the Board in either case, but the constitutional question was not in issue. *NLRB* v. *Mackay*, 304 U.S. 333 (1938); *Consolidated Edison Co.* v. *NLRB*, 305 U.S. 197 (1938).

[7] 328 U.S. 818 (1946).

occasions,[5] and *NLRB* v. *Walton Mfg. Co.*, 369 U.S. 404 (1962).

With respect to the *Morgan* cases, because of the several decisions and the generality of the language used, its holding may be regarded as somewhat ambiguous although it generally supports Petitioner's position.[6] In addition, the *Morgan* cases were decided at the very infancy of the administrative tribunal system and it seems now appropriate for this Court to state more definitive guidelines as to the requirements of due process with respect to these "multiplying agencies."

The *Walton* case is more closely analogous to the instant case. The Fifth Circuit Court of Appeals established in effect a *per se* rule as to the weight to be given to the testimony of employers in reinstatement cases before the Board, holding that unless an employer's testimony was impeached or contradicted in such cases, the testimony must be accepted as true. This Court struck down the rule because it disregarded the importance of the observation of the demeanor of witnesses by the one hearing the evidence.

A leading authority, Professor Davis, in his *Administrative Law Treatise* concluded that ". . . the emerging basic

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[5] 298 U.S. 468 (1936); 304 U.S. 1 (1938); 307 U.S. 183 (1939); and 313 U.S. 409 (1941).

[6] See, for example, "the one who decides must hear" in *Morgan* I at p. 481; ". . . these multiplying agencies . . . must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concept of fair play . . ." (Morgan II, p. 22); and the emphasis by the Court that the Secretary of Agriculture "dealt with the enormous record in a manner not unlike the practice of judges in similar situations and that he held various conferences with the Examiner who heard the evidence" (Morgan IV, p. 422).

principle to which most of the cases adhere is that one hearing or deciding officer may be substituted for another if but only if those who decide have opportunity to take into account the demeanor of witnesses in any case in which demeanor of witnesses may be a substantial factor." Vol. 2, Sec. 11.21, p. 129.

Since this Court has not specifically dealt with the subject of the constitutional necessity of a deciding tribunal receiving a report or recommendations from the hearing officer who heard and observed the witnesses, and particularly since the question here involves a broad statutory provision prohibiting the hearing officer from making any report to the deciding tribunal, the Court should pass upon this important federal question.

B. The Specific Application of the Constitutional Requirement of Due Process to Representation Hearings Required by the National Labor Relations Act, as Amended.

This case also involves a second issue of substantial importance which should be decided by this Court; namely, whether the representation hearing required by Section 9(c)(1) of the National Labor Relations Act, as amended, is subject to the constitutional protection of due process.

This issue also has not previously been passed upon by this Court. Like the question in Point A, decisions on related issues lead to conflicting conclusions in applying them to the present case. For example, *Inland Empire Council* v. *Millis,* 325 U.S. 697 (1945), has been cited as possible support for the proposition[10] that a representation hearing is not a "trial type hearing,"[11] because of

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[10] See opinion of Judge Friendly, p. A-7, Appendix A.

[11] Davis, *Administrative Law Treatise,* Vol. 1, Section 7.02, as to "trial type hearings."

comments such as the proceeding is "not technical" and is "essentially informal, not adversary."[12] Yet the Court in that case emphasized in its opinion that the purpose of the hearing was to provide "interested parties full and adequate opportunity to present their objections before the Board" (p. 708) and that due process required at some point in the proceeding "the requisite hearing [be] held before the final order becomes effective" (p. 710).

Although there can be no question but that an employer has a right "to be heard" with respect to the determination of the bargaining unit,[13] the representation hearing is in fact the *only point* at which a resolution of credibility issues and conflicts in testimony can be made by the one hearing and observing the witnesses. At every hearing thereafter, including before a trial examiner in a refusal to bargain case, only the written transcript is considered as to the bargaining unit determination.[14]

If, therefore, due process does require, at least in cases involving resolutions of issues of credibility, a report of the hearing officer, the only hearing at which such resolutions can be made is the representation hearing provided by Section 9(c)(1)—and by the terms of the statute challenged the hearing officer is expressly prohibited from making any recommendations.[15]

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[12] However, cf. *Boire* v. *Greyhound Corp.*, 376 U.S. 473 (1964), in which the Court in referring to the case of *Leedom* v. *Kyne*, 358 U.S. 184 (1958) described the proceeding as "a purely domestic *adversary* situation." (p. 480) (Italics supplied.)

[13] *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438 (1965).

[14] 28 U.S.C. 159(d), Section 9(d) of the Act; *NLRB* v. *Poinsett Lumber & Mfg. Co.*, 221 F.2d 121 (C.A. 4, 1955).

[15] The importance of this hearing is emphasized by the fact that a decision as to the appropriate bargaining unit "if not final, is rarely to be disturbed." *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947).

In a later step in the representation proceeding—*i.e.*, determining the eligibility of specific employees to vote with respect to challenged ballots—the courts have uniformly insisted that due process is applicable to such determinations. *NLRB* v. *Capital Bakeries, Inc.*, 351 F.2d 45, 51 (C.A. 3, 1965); *NLRB* v. *Joclin Mfg. Co.*, 314 F.2d 627 (C.A. 2, 1963). Indeed the Board's Regulations specifically recognize that "a report resolving questions of credibility" may be required in such cases.[16] Obviously, the question of whether *individual* employees come within a bargaining unit in an election is of far less importance than the initial determination of the scope of the *entire* bargaining unit.

This Court not having passed upon the application and extent of the requirements of due process in the representation hearing, it is submitted that this important federal question should also now be decided by this Court.

A subsidiary issue presented involves whether or not the constitutional issue can be initiated by a court proceeding during the representation hearing, as opposed to the Petitioner being compelled to go through the review procedure required by Sections 10(e) or (f) of the Act (29 U.S.C., Sec. 160(e) and (f)). The Petitioner however is not seeking a "review" of a decision in a representation proceeding. Rather, it is challenging the validity of the procedure of the Board, similar to the challenge to the Board's authority in *Leedom* v. *Kyne*, 358 U.S. 184 (1958).

It would seem clear that if a hearing is being conducted in violation of the constitutional requirements of due process, a party to the hearing need not wait for some alternative time to raise the question and such action is not therefore premature. *Boire* v. *Miami Herald Publish-*

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[16] Rules and Regulations of the Board, Series 8, as amended, Sections 102.69(d) and (e).

ing Co., 343 F.2d 17 (C.A. 5, 1965), cert. den. 382 U.S. 824.

II. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals.

The Court of Appeals in its opinion stated the principal question in this case to be whether the due process clause of the Fifth Amendment requires "that when there are issues of credibility, as was assumed to be true here, no determination of fact may be made unless the decider has either seen the witnesses himself or has been furnished with a report as to credibility by another who has . . .[17] (Appendix A, p. A-4). The Court answered this question in the negative stating that a report by the hearing officer was not a "constitutional imperative."

A contrary result was reached by the Court of Appeals of the Seventh Circuit in *S. Buchsbaum & Co.* v. *FTC*, 153 F.2d 85 (1946)[18] which held that the failure to have a trial *de novo* after the death of a trial examiner constituted a violation of due process since the second examiner did not hear all the witnesses.[19] This case was disregarded by the Court of Appeals in the instant case and instead it relied upon *NLRB* v. *Stocker Mfg. Co.*, 185 F. 2d 451 (C.A. 3, 1950) holding that with respect to a National Labor Relations Board proceeding there was no

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[17] This is in fact a too narrow statement of the issue involved. The issue here is the validity of a statute prohibiting such a report in *every case*, not only whether in this particular case a report of the hearing officer was a constitutional necessity.

[18] Cert. granted but error waived 328 U.S. 818 (1946).

[19] See also *Smith* v. *Dental Products Co.*, 168 F.2d 516 (C.A. 7, 1948) (Master in an action for accounting died after hearing the evidence and district judge then decided case); *Federal Deposit Insurance Corporation* v. *Siraco*, 174 F.2d 360 (C.A. 2, 1949) (Judge who heard witnesses died and second judge rendered judgment). Both cases were reversed.

constitutional violation in a second trial examiner continuing with a case after the death of the first.[20]

The instant case and the *Stocker* case are squarely in conflict with the *Buchsbaum* case and this conflict should be resolved by this Court.

CONCLUSION.

This case not only presents the question of the constitutional validity of a provision of a major federal act, but also affords the Court an opportunity to resolve important questions with respect to the application of due process requirements to the administrative process and specifically to representation hearings pursuant to the National Labor Relations Act. Because these questions need to be, and may now be, resolved, Petitioner submits the writ of certiorari should issue.

Respectfully submitted,

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June 12, 1967

[20] Criticized in *Gamble-Skogmo, Inc.* v. *FTC*, 211 F.2d 106 (C.A. 8, 1954) holding replacement of trial examiner violated Administrative Procedure Act, and by Davis, *Administrative Law Treatise*, Vol. 2, Sec. 11.18, p. 115. See footnote 5, p. 7, *supra*.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

Misc. No. ———

UTICA MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, and THE HONORABLE STEPHEN W. BRENNAN, SENIOR JUDGE OF SAID DISTRICT COURT,
Respondents.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Petitioner herein today filed with this Court a petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. In the alternative, Petitioner hereby files this motion for leave to file with this Court said petition for writ of certiorari as a petition for writ of mandamus to the District Court of the Northern District of New York and The Honorable Stephen W. Brennan, Senior Judge of said District Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

While a petition for writ of certiorari is appropriate for review of the decision of the Court of Appeals, particularly with respect to the dismissal of the complaint and Petitioner's prayer for declaratory relief, *Kennedy* v. *Mendoza-Martinez,* 372 U.S. 144 (1963); *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962), the refusal of the District Court to convene a three judge

panel with respect to Petitioner's prayer for an injunction because of the alleged constitutional invalidity of the applicable statute pursuant to 28 U.S.C. § 2282 is subject to review by a petition for writ of mandamus. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein, supra; Ex Parte Bransford,* 310 U.S. 354 (1940); Currie, *The Three Judges District Court in Constitutional Litigation,* 32 Univ. of Chicago L. Rev. 1.

The correctness of the decision of the District Court to refuse to convene the three judge panel is determined by whether the constitutional question raised is substantial, and "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co., et al* v. *City of Redding, et al,* 304 U.S. 252, 255 (1938). Also see *Hannis Distilling Co.* v. *Baltimore,* 216 U.S. 285, 294 (1910).

There is no decision of this Court which forecloses the subject involved in this case and, it is submitted, the question is certainly not "obviously without merit."

Accordingly, if for some reason this Court does not grant Petitioner's prayer for writ of certiorari, Petitioner prays that a writ of mandamus be issued.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 192—September Term, 1966.
(Argued January 26, 1967 Decided March 14, 1967.)
Docket No. 30756

UTICA MUTUAL INSURANCE COMPANY,
Appellant,

—v.—

MERLE D. VINCENT, JR., Regional Director of the Third Region of the National Labor Relations Board,
Appellee.

Before:
MOORE and FRIENDLY, *Circuit Judges,* and
BRYAN, *District Judge.**

Appeal from an order of the District Court for the Northern District of New York, Stephen W. Brennan, *Senior Judge,* dismissing a complaint whereby plaintiff sought to enjoin a representation hearing under §9(c)(1) of the National Labor Relations Act because of alleged unconstitutionality of the provision therein that the hearing officer shall not make any recommendations. Affirmed.

CHARLES BARNHILL (Philip C. Lederer, Kalvin M. Grove, Chicago, Ill.; Thomas P. Schnitzler, Patrick L. Vaccaro, New York, N. Y.) (Lederer, Barnhill and Fox; Morgan F. Bisselle, New Hartford, N. Y.; Jackson, Lewis and Schnitzler, of Counsel, *for Appellant.*

ELLIOT C. LITCHMAN (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Assistant General Counsel, Herman M. Levy, Attorney), *for Appellee.*

* Of the Southern District of New York, sitting by designation.

FRIENDLY, *Circuit Judge:*

This action was brought in the District Court for the Northern District of New York by Utica Mutual Insurance Company ("Utica"), a New York corporation, against the Regional Director of the Third Region of the NLRB. The complaint alleged that Communications Workers of America, AFL-CIO, had filed a petition seeking certification as exclusive bargaining representative of the office clerical, maintenance and cafeteria workers in Utica's main office; that the Regional Director had thereupon caused to be served a notice of a representation hearing pursuant to §9(c) of the National Labor Relations Act and §102.63 et seq. of the Board's Rules and Regulations; and that such a hearing had begun before a hearing officer. The gravamen of the complaint was that the provision in §9(c)(1) that the hearing officer "shall not make any recommendations with respect thereto" deprived Utica "of its valuable property rights to a full and fair hearing on the matter of an 'appropriate bargaining unit' " without the due process of law guaranteed by the Fifth Amendment, whether decision were to be made by the Regional Director of by the Board, see Rules and Regulations §102.67. The complaint sought a declaratory judgment of invalidity and interlocutory injunctive relief. Finding that the complaint raised no substantial constitutional question, Judge Brennan declined to convoke a court of three judges under 28 U. S. C. §2282 and dismissed the action.

When a complaint for an injunction makes a claim of unconstitutionality which on its face would require a court of three judges under 28 U. S. C. §2281 or 2282, the single district judge should consider whether the claim is substantial and, if he finds it is not, refuse to convoke a court of three judges and dismiss the action. *Ex parte Poresky,* 290 U. S. 30 (1933); *California Water Service Co.* v. *City of Redding,* 304 U. S. 252, 254-55 (1938); *Wicks* v. *Southern Pacific Co.,* 231 F. 2d 130 (9 Cir.), cert. denied, 351 U. S. 946 (1956); *White* v. *Gates,* 253 F. 2d 868 (D. C. Cir.), cert. denied, 356 U. S. 973 (1958);

Carrigan v. *Sunland-Tujunga Telephone Co.*, 263 F. 2d 568 (9 Cir.), cert. denied, 359 U. S. 975 (1959); *Bell* v. *Waterfront Comm.*, 279 F. 2d 853, 857-58 (2 Cir. 1960); *Powell* v. *Workmen's Compensation Board*, 327 F. 2d 131, 138 (2 Cir. 1964).[1] This is not merely a power confided to the single district judge but an important responsibility, since the requirement of three judges "entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the effective administration of justice," *Phillips* v. *United States*, 312 U. S. 246, 250 (1941), a burden not only on the inferior courts but, if the three judges retain the case, upon the Supreme Court by virtue of the provision for direct appeal, 28 U. S. C. §1253.[2] Appeal from a dismissal by a single judge lies to the court of appeals. *Bell* v. *Waterfront Comm.*, *supra*, 279 F. 2d at 858, and cases there cited; cf. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713 (1962). We hold that Judge Brennan properly performed his duty in this case.

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[1] The classical theory, stated in *Ex parte Poresky*, *supra*, 290 U. S. at 31, is that "the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction." A more realistic explanation, which also justifies the rule of *Bailey* v. *Patterson*, 369 U. S. 31 (1962), that three judges are not required when "prior decisions made frivolous any claim that a state statute on its face is not unconstitutional," and is intimated in that opinion, is that Congress could not have intended to require three judges to be assembled when decision could not possibly go in any manner save one. This rationale would also authorize a single judge to dismiss a complaint asserting a frivolous constitutional claim in the unusual case where diversity jurisdiction existed.

[2] The number of three-judge cases, other than review of orders of the Interstate Commerce Commission, has increased from 62 in fiscal 1963 and 69 in 1964 to 87 in 1965 and 90 in 1966. Administrative Office of U. S. Courts, Ann. Reps. 1963 at 143, 1964 at 154, 1965 at 118, 1966 at II-36 (preliminary edition).

As to the substantiality of Utica's constitutional objection, we take as our criterion the Supreme Court's statement, "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject." *California Water Service Co.* v. *City of Redding, supra,* 304 U. S. at 255. Utica finds in the due process clause of the Fifth Amendment a requirement that when there are issues of credibility, as was assumed to be true here, no determination of fact may be made unless the decider has either seen the witnesses himself or has been furnished with a report as to credibility by another who has, save when circumstances such as the death of a deposed witness unavoidably prevent. We discern no such absolute in the history laden words of the Fifth Amendment; Utica would freeze what is usually a sensible rule of judicial administration into a constitutional imperative.

Even on issues where due process requires a "trial type" hearing, the due process clause makes no such inexorable command as Utica asserts.[3] Chief Justice Hughes' ringing pronouncement in the first *Morgan* case, "The one who decides must hear," was preceded by a statement that "while it would have been good practice to have the examiner prepare a report and submit it to the

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[3] When the Constitution was adopted, it had become the settled practice in English chancery courts for evidence to be taken almost wholly by deposition. "There never was a case where witnesses have been allowed to be examined at large at the hearing; and though it might be desirable to allow this, yet the fixed and settled proceedings of the court cannot be broke through for it." *Graves* v. *Eustace Budgel,* 1 Atk. 444, 445, 26 Eng. Rep. 283 (Ch. 1737). See 9 Holdsworth, A History of English Law 353-58 (1926). 5 Wigmore, Evidence §1417a(1) (3rd ed. 1940), also cites American statutes permitting the use of depositions even when the deponent is available to be called as a witness. It is unlikely that the framers could have meant to proscribe as contrary to "due process of law" such an established system, however frequently acknowledged its defects may have been.

Secretary and the parties . . . we cannot say that that particular type of procedure was essential to the validity of the hearing," and was followed by the explanation:

> "This rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates. Argument may be oral or written. The requirements are not technical. But there must be a hearing in a substantial sense. And to give the substance of a hearing, which is for the purpose of making determinations upon evidence, the officer who makes the determinations must consider and appraise the evidence which justifies them." *Morgan* v. *United States,* 298 U. S. 468, 478, 481-82 (1936).

Nothing in this suggests that the decider must actually hear the witnesses or be furnished a report on their credibility; the thrust is quite the opposite.[4] Although the respondent in *NLRB* v. *Mackay Radio & Tel. Co.,* 304 U. S. 333, 350-51 (1938), did not raise the precise argument advanced by Utica, the Supreme Court there sanctioned the Labor Board's transferring a case to itself at the conclusion of the testimony and deciding it without an examiner's report; Mr. Justice Roberts said, "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights," and cited *Morgan I. Consolidated Edison Co.* v. *NLRB,* 305 U.S. 197, 226-

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[4] Utica's attempt to becloud the Chief Justice's statement and thus narrow the latitude given to administrative agencies by reference to Mr. Justice Frankfurter's comment in *Morgan IV* that on a later occasion the Secretary of Agriculture "held various conferences with the examiner who heard the evidence," *United States* v. *Morgan,* 313 U. S. 409, 422 (1941), manifestly fails; nothing in the later opinion remotely suggests that the order ultimately made would have been invalidated if such conferences had not been held.

29 (1938), is in accord. With this background the framers of the Administrative Procedure Act could scarcely have doubted the validity of the provisions of §8(a) which permits an agency to require the record to be certified to it and to dispense with a hearing officer's report not only in rule making but in determining applications for initial licenses "in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires." Yet the provision in §9(c)(1) of the National Labor Relation Act here attacked is simply a general declaration by Congress, see fn. 6, that due and timely execution of the NLRB's functions in representation cases invariably requires what §8(a) of the APA authorizes on a finding in a particular case. Courts of Appeals have ruled that when a trial examiner who had heard the evidence dies or retires before preparing his report and another examiner is designated to do this, there is no denial of due process, *NLRB* v. *Stocker Mfg. Co.*, 185 F. 2d 451, 453 (3 Cir. 1950); *Gamble-Skogmo, Inc.* v. *FTC*, 211 F. 2d 106, 113 (8 Cir. 1954).[5] And we on our own part have recognized "that the due process clause does not require under all circumstances that factual determination be made by the person hearing the evidence." *United States* v. *Vater*, 259 F. 2d 667, 673 (2 Cir. 1958) (dictum).

In fact, however, we entertain the gravest doubt that the hearing directed in §9(c)(1) must be of the trial type. The existing statute derives from §9(c) of the Wagner Act, 49 Stat. 453 (1935), which had provided:

> "Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the

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[5] The weight of these statements as to the requirements of due process is not eliminated by the *Gamble-Skogmo* holding that a new hearing was required by §5(c) of the APA or by the disagreement of the *Gamble-Skogmo* court and a distinguished author, 2 Davis, Administrative Law Treatise §11.18 at 115 (1958), with the *Stocker* case as an application of the APA.

parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertin [sic] such representatives."

The Supreme Court held in *Inland Empire Dist. Council* v. *Millis,* 325 U. S. 697, 706 (1945), that the hearing need not precede the election but could follow it; commenting on the nature of the hearing, the Court said that "obviously great latitude concerning procedural details is contemplated," that "requirements of formality and rigidity are altogether lacking," that the proceeding "is not technical" but "is an 'investigation,' essentially informal, not adversary," and that "the investigation is not required to take any particular form or confined to the hearing." This seems to mean that although the Board was required to hear relevant evidence proffered by interested parties, it was not limited to such evidence or by traditional trial type hearing requirements. While the Court directed its remarks to the construction of the Wagner Act, it also noted, as would have been implicit in any event, that the Act as so construed did not violate due process. 325 U. S. at 710.

The Taft-Hartley Act, 61 Stat. 144 (1947) considerably elaborated the simple provision of its predecessor, amending §9(c)(1) to read as follows:

"(c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative

defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

Although under the amendment the hearing must invariably precede the election,[6] neither the language of the statute nor the committee reports indicated that any change in its nature was intended. Rather, although pre-election hearings "became mandatory," here as in *Nor-*

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[6] The provision to which Utica objects was rather obviously designed to prevent this change from causing undue delay in elections. The Senate Report, taking cognizance of the fact that "Regional office personnel now sit as hearing officers in representation cases and make a comprehensive report and recommendations to the Board at the close of such hearing," considered it important to make clear that under the amendment "such hearing officer's duties are confined to presiding at the hearing." S. Rep. 80th Cong., 1st Sess., No. 105 at 25, reprinted in 1 Legislative History of the Labor Management Relations Act, 1947, 431.

wegian Nitrogen Prods. Co. v. *United States,* 288 U. S. 294, 319 (1933), "The form remained the same."

There is much reason why a representation hearing should not have to be of the trial type. What is likely to be the prime issue, "whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof," §9(b), is more nearly "legislative" than "adjudicative," see I Davis, Administrative Law Treatise §7.02 (1958). Indeed, it bears considerable resemblance to the constitution of an electoral unit, where no one has ever supposed trial type procedures to be required. And such a hearing has another quality which has been deemed to justify departure from trial type hearing requirements—the provisional nature of any determination arising therefrom. A representation hearing is simply a preliminary to an election which may or may not result in a certification; if it does, and the employer refuses to bargain, he is entitled to present in an unfair labor practice proceeding any material evidence he was prevented from introducing at a hearing under §9(c). *NLRB* v. *Ideal Laundry & Dry Cleaning Co.,* 330 F. 2d 712, 716 (10 Cir. 1964); see *NLRB* v. *Dewey Portland Cement Co.,* 336 F. 2d 117 (10 Cir. 1964). The Supreme Court has instructed that "The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." *Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 152-53 (1941); see also *Inland Empire Dist. Council* v. *Millis, supra,* 325 U. S. at 710. Cf. *United States* v. *Illinois Central R.R.,* 291 U.S. 457 (1934).

Since we are thus convinced that Utica's constitutional argument is so clearly incorrect as to be frivolous, it becomes unnecessary to consider another ground urged by the Government to support dismissal of the complaint, namely, that regardless of the merits, judicial action at

this time would have been inconsistent with the Congressional policy "that in the normal course of events Board orders in certification proceedings under §9(c) are not directly reviewable in the courts," *Boire* v. *Greyhound Corp.*, 376 U. S. 473, 476 (1964)—a rule applying *a fortiori* to a suit preceding a representation hearing.[7] It does indeed seem doubtful that Utica could bring itself within *Fay* v. *Douds*, 172 F. 2d 720 (2 Cir. 1949), recognizing an exception where the plaintiff makes a "not transparently frivolous" assertion of unconstitutional destruction of a property right, even if we assume that case to be still authoritative, not only because its claim in our view was "transparently frivolous" but also because Utica has no "property right" in the designation of the unit of its employees with which it may be required to bargain, even though the National Labor Relations Act entitles it to be heard thereon. See *NLRB* v. *National Mineral Co.*, 134 F. 2d 424, 426-27 (7 Cir.), cert. denied, 320 U. S. 753 (1943); *Foreman & Clark, Inc.* v. *NLRB*, 215 F. 2d 396, 406-07 (9 Cir.), cert. denied, 348 U. S. 887 (1954).

The order dismissing the complaint is affirmed.

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[7] While the matter may not be free from doubt, we think inability of the court to grant relief even if the constitutional claim were well founded justifies dismissal by a single judge. The three judge requirement was directed to determinations on the issue of constitutionality, not to decisions that for other reasons the court could not properly act. See D. Currie, The Three Judge District Court in Constitutional Litigation, 32 U. Chi. L. Rev. 1, 24-27 (1964); cf. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U. S. 713, 715 (1962).

UNITED STATES COURT OF APPEALS
For The Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the fourteenth day of March one thousand nine hundred and sixty-seven.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY, *Circuit Judges,*
HON. FREDERICK P. BRYAN, *District Judge.*

UTICA MUTUAL INSURANCE COMPANY,
Plaintiff-Appellant,
v.
MERLE D. VINCENT, JR., Regional Director of the Third Region of the National Labor Relations Board,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is AFFIRMED.

A. DANIEL FUSARO
Clerk

APPENDIX B.

Order and Opinion of the Court

UNITED STATES DISTRICT COURT
Northern District of New York

* * (Caption—Civil No. 66-CV-236) * *

ACTION FOR DECLARATORY JUDGMENT AND INJUNCTION

Argued July 19, 1966; Submitted July 22, 1966; Decided July 29, 1966.

MEMORANDUM DECISION AND ORDER

BRENNAN, Judge

The ultimate problem at this stage of the litigation is to determine the sufficiency of the showing made by the plaintiff, as to the unconstitutionality of a federal statute, to afford this court jurisdiction and to require the formation of a three-judge court in accordance with the provisions of 28 U. S. C. 2284. The factual background rests principally upon the allegations of the complaint which, as far as pertinent here, is summarized below.

On June 10, 1966 the Commission Workers of America AFL-CIO, by petition, sought certification as the bargaining representative of certain employees of the plaintiff at its main office at New Hartford, N.Y. There is no dispute but that the procedural steps required by Section 9 of the Labor Management Relations Act, 29 U.S.C. 159, were followed and a representation hearing, looking to the certification of the above petitioner, was set for July 8, 1966. A Hearing Officer was appointed by the defendant to conduct such hearing, by the provisions of 9(C)(1)(B), 29 U.S.C. 159(c)(1)(B) of the Act. Said Officer is prohibited from making any recommendations with respect to such hearing. Shortly after the opening of the hearing, plaintiff filed a complaint in this court which in effect challenges the constitutionality of a particular provision of the above section of the statute.

The complaint seeks a determination by this court that the hearing deprives plaintiff of its rights under the Fifth Amendment and requests a preliminary injunction and temporary restraining order prohibiting the plaintiff from proceeding with the hearing. The application for the temporary restraining order was denied. It must be admitted that this court vacillated as to the formation of a three-judge court for which oral request was made by the plaintiff and eventually decided that the parties to this litigation should be heard as to the existence of a substantial constitutional question in the matter of plaintiff's attack upon the constitutionality of the statute referred to above. The litigants were advised that the problem would be considered on July 19, 1966. The parties appeared through counsel; arguments were heard; plaintiff made certain offers of proof; briefs were filed and the problem is before the court for decision.

Although the Government claims this action is premature, the decision in McLeod v. Local 476 United Brotherhood of Indus. Wks., 288 F.2d 198 and cases cited would seem to afford same the necessary support and the court will proceed to the merits.

We first turn to this court's obligation at this stage of the proceeding as defined by reported decisions. Since the decision in Ex Parte Poresky, 290 U.S. 30, it is recognized that it is essential to jurisdiction that a substantial question of constitutionality must be presented, the existence of which is to be determined by the allegations of the complaint. (See also Bell v. Waterfront Commission, 279 F.2d 853). The Supreme Court in California Water Service Co. et al vs. City of Redding et al, 304 U.S. 252 at page 255 affords guide lines in determining the question in the following quotation: "The lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject". The problem then becomes one of determining the issues involved, the obvious merit or lack thereof in the contention made and the status of court decisions relevant thereto.

The plaintiff's attack is directed solely to that provision of the statute which, after providing for the preliminary steps to be taken in a representation proceeding culminating in the direction for an appropriate hearing, further provides

> "Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto".

It seems to be plaintiff's contention that in this present hearing the provision, which prohibits the hearing officers from making any recommendation to the party, deciding the issues involved, deprives plaintiff of "property without due process of law".

This court is of the opinion that the contention is nothing more than one to the effect that procedural due process requires that the party making the ultimate decision must personally be present at any hearing where evidence is received in order that he may evaluate the credibility of witnesses through observation of their demeanor, intelligence, powers of observation and ability of expression. The plaintiff however disagrees with the above issue, asserts that the case is one of first impression and frames the issue in the following language.

> "A. Definition of issues.
>
> 1. What the issue is: The issue here is the constitutionality of a broad and unqualified statutory prohibition which excludes a hearing officer from participation in any way, even to the extent of making recommendations, in a case in which he alone has heard the evidence, viewed the witnesses and observed their demeanor; and the prohibition is applicable without regard to the issues which may be involved, the complexity of the case or the seriousness of the conflict among the witnesses and of the evidence.
>
> 2. What the issue is not: This case does not involve the question of whether in a *specific* case or in a *particular* proceeding the failure of a hearing officer to participate in some way in the decisional process

was violative of due process; nor does it involve the question of whether due process requires the participation of the hearing officer in *all* cases."

The court's interpretation of the above definition is to the effect that the issue of constitutionality rests upon the statutory prohibition which precludes the hearing officer from participating in the decision although it is recognized that procedural due process is not denied where such a participation is neither furnished nor required. It appears to be contended that it is the prohibition of the statute rather than the resulting inaction of the hearing officer that renders the statute unconstitutional. If the court is correct in the above interpretation, then the several decisions as cited by the defendant will be referred to but not discussed in detail. The decision in Morgan v. U. S., 298 U.S. 468 holds that in an administrative proceeding, evidence may be taken by an examiner although the ultimate findings are made by the Secretary of Agriculture. In Labor Board v. Mackay Co., 304 U.S. 333 at 350 and 351, it was held that where an examiner did not submit a report in a labor case, the Board properly decided the issues upon the record and further held "the Fifth Amendment guarantees no particular form of procedure; it protects substantial rights". In Edison Co. v. Labor Board, 305 U.S. 197 at 228, 229, where the examiner made no report and the finding was made by the Board, no denial of procedural due process was shown. The above principle is recognized in lower court decisions such as in National Labor Relations v. Stocker Manufacturing Co., 185 F.2d 451; U. S. v. Seminole Nat., 173 F.S. 784; McGraw Elect. Co. v. U.S., 120 F.S. 354. In Lacomastic Corp. v. Parker, 54 F.S. 138, the court at page 141, in discussing the principle of law involved, refers to the long accepted practice even in the trial courts where the deposition of witnesses is read to the court or jury or the entire testimony is taken by a master although the ultimate decision is made by a jury or judge. In Gamble-Skogmo Inc. v. Federal Trade Commission, 211 F.2d 106 at page 113, the court held that the opportunity for the credibility evaluation of witnesses is a procedural grant and "not substantive due-process requisites".

It is true that decisions may be found which hold that one who hears the evidence must decide the issue and our Circuit Court of Appeals has discussed the problem as it relates to a condemnation case in U. S. v. Vater, 259 F.2d 667. The plaintiff relies, at least to some extent upon this decision and especially to a statement in the dissenting opinion. The above decision involved a trial while this is an administrative proceeding. The legislative history and purpose of the National Labor Relations Act as discussed in some detail in the dissenting opinion in Leedom v. Kyne, 358 U.S. 184 may not be discarded in its purpose and congressional intent.

The plaintiff ignores or has overlooked the nature of the representation proceeding of which the hearing is a part. The Supreme Court in Inland Empire Council v. Millis, 325 U.S. 697 defines same as: "It is an "investigation", essentially informal, not adversary". The following quotation from N.L.R.B. v. Botany Worsted Mills, 133 F.2d 876 at 882 is also appropriate: "The preliminary investigation and the hearing in the representation proceeding are not contentious litigation; not even litigation, but investigation". It is true that the status of employees may be the subject of dispute. Contradictory evidence may be offered and it may be assumed that credibility is involved but this does not change the character of the proceeding which is not required to take any particular form or to be confined within the limits of the hearing itself. The hearing officer is engaged in an investigative act and it is to be noted that in the provisions of the Administrative Procedural Act, 5 U.S.C. 1004, it is provided that in the certification of employee representatives, no employee engaged in the performance of investigative functions shall participate or advise in the decision. It would seem to follow both from the statutes and from the above decisions, which have been followed in many reported cases, that the intent of Congress is plain to the effect that the strict requirements of due process are not to be applied to the hearing here involved. The hearing is but an intermediate step in the investigation which

may lead either to the requested certification or the dismissal of the petition. If certification follows, a review of the hearing may eventually be obtained in the event of a refusal of the employer to bargain. Boyre v. Greyhound Corp., 376 U.F. 473. It is argued that to force the plaintiff to face an unfair labor charge in order to review a hearing which results in a certification is a factor to be considered here. That a direct appeal from the certification order should be provided has no relevancy to the question of constitutionality raised in this complaint. The propriety of the present procedure is referred to in the recent decision of the U.S. Ct of Appeals, Second Circuit, July 25, 1966 in Publishers' Association of New York City et al v. National Labor Relations Board.

Plaintiff's claim of the unconstitutionality of the specific sentence of the statute appears to be vague and uncertain. It seems to be admitted that same affords due process in some representation proceedings while it results in the denial thereof in an undefined area of the same type of litigation. At best it seems to amount to a claim that due process is satisfied in instances where the hearing officer takes no action in the matter of the ultimate decision but is denied when such action is prohibited. It appears to this court that the conclusion obviously does not follow the argument.

It is concluded, at least in this type of a proceeding, that the plaintiff has failed to show that this litigation involves a substantial question of constitutionality of the statute involved within the guide lines afforded in California Water Service Co. et al v. City of Redding et al, supra, that the formation of a three-judge court to hear this litigation is unwarranted and that the complaint should be dismissed, and it is

So Ordered.

Stephen W. Brennan
Senior U. S. District Judge.

APPENDIX C.

A. The relevant provisions of statutes cited are as follows:

Title 29 U.S.C.

§159 Representatives and Elections

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . .

(c)(1) Wherever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

> (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof. (61 Stat. 143).

Title 28 U.S.C.

§2282 Injunction against enforcement of Federal statute; three judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. (62 Stat. 968).

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 242

UTICA MUTUAL INSURANCE COMPANY, PETITIONER

v.

MERLE D. VINCENT, JR., REGIONAL DIRECTOR OF THE THIRD REGION OF THE NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 221 Misc.

UTICA MUTUAL INSURANCE COMPANY, PETITIONER

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, AND THE HONORABLE STEPHEN W. BRENNAN, SENIOR JUDGE OF SAID DISTRICT COURT

ON MOTION FOR LEAVE TO FILE A PETITION FOR WRIT OF MANDAMUS

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1–10) is not yet officially reported. The memorandum

decision and order of the district court (Pet. App. B 1–6) are unreported.

JURISDICTION

The decision and judgment of the court of appeals were entered on March 14, 1967 (Pet. App. A 1, A 11). The petition for a writ of certiorari (No. 242), and the motion for leave to file a petition for writ of mandamus (No. 221 Misc.) were filed on June 12, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (certiorari) and 28 U.S.C. 1651(a) (mandamus).

QUESTIONS PRESENTED

1. Whether Section 9(c)(1) of the National Labor Relations Act violates the due process clause of the Fifth Amendment to the Federal Constitution because it precludes the hearing officer in a representation investigation from making a recommendation or indicating his opinion on questions of credibility.

2. Whether the district court properly dismissed the complaint without convening a three-judge district court pursuant to 28 U.S.C. 2282.

STATUTES AND OTHER PROVISIONS INVOLVED

The relevant statutes and constitutional provision are set forth at Pet. App. C 1–3.

STATEMENT

On about June 10, 1964, Communications Workers of America, AFL–CIO ("the Union") filed a petition with the Regional Director of the Board seeking certification as the exclusive bargaining representative

for a unit of petitioner's employees at its main office in New Hartford, New York. Following an investigation, the Regional Director served a Notice of Representation Hearing upon petitioner pursuant to Section 9(c)(1) of the Act (Pet. App. C 1-2). On July 8, 1966, the hearing commenced before a hearing officer appointed by the Regional Director (J.A. 3, 9).[1]

On the same day, petitioner filed a complaint in the United States District Court for the Northern District of New York, alleging that the provision in Section 9(c)(1), which prohibits the hearing officer in a representation hearing from making recommendations to the Board,[2] deprived petitioner "of its valuable property rights to a full and fair hearing on the matter of 'an appropriate bargaining unit' " in violation of the due process clause of the Fifth Amendment (J.A. 6). The complaint sought a preliminary injunction restraining the Regional Director from continuing the representation hearing and a declaration that the hearing deprived petitioner of constitutional rights (J.A. 7). Petitioner also requested a hearing before a three-judge district court under 28

[1] "J.A." refers to the portions of the record printed in the joint appendix filed in the court of appeals.

[2] Section 9(c)(1) provides, in relevant part, that:

"* * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof."

U.S.C. 2282 (J.A. 17). On July 13, 1966, the Regional Director filed an opposition to the request for a three-judge court, and moved to dismiss the complaint (J.A. 8). Following oral argument, the district court held that petitioner's contention was too insubstantial to warrant convening a three-judge court, and dismissed the complaint (Pet. B 1–6).

The Court of Appeals for the Second Circuit affirmed. The court agreed that petitioner's constitutional claim was too insubstantial to require a three-judge court, and that the complaint was properly dismissed. (Pet. A 1–9.)

ARGUMENT

1. The courts below correctly rejected petitioner's contention that Section 9(c)(1) of the Act offends the due process clause of the Fifth Amendment because it precludes the hearing officer in a representation case from making a recommendation or issuing a report concerning his assessment of the credibility of witnesses.[3]

In *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 350–351, and *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 226, 229, this Court upheld the procedure in unfair labor practice cases, which then existed under the Wagner Act, whereby trial examiners received testimony and transferred the cases directly to the Board without tentative reports or findings. The

[3] It should be noted that the procedure of which petitioner complains is prescribed by statute and not merely a rule promulgated by the Board. Compare *Greene* v. *McElroy*, 360 U.S. 474, with *Hannah* v. *Larche*, 363 U.S. 420.

Board's scrutiny of the record and briefs was deemed sufficient to fulfill the due process requirements of the Constitution. As the Court stated in *Mackay* (304 U.S. at 351): "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights. Compare *Morgan* v. *United States*, 298 U.S. 468, 478." See also Pet. App. A–4, n. 3.

Morgan v. *United States*, 298 U.S. 468 (*Morgan I*), relied on by petitioner (Pet. 7–8), actually supports the Board's position. There, the Court, as in the subsequent cases cited above, eschewed any requirement that a hearing officer make a report on the evidence, stating, "while it would have been good practice to have the examiner prepare a report and submit it to the Secretary and the parties * * * we cannot say that that particular type of procedure was essential to the validity of the hearing" (*id.*, at 478; see also *Morgan* v. *United States*, 304 U.S. 1, 21). Nor did the Court in *Morgan I* lay down any requirement that deciding officers must actually see or hear the witnesses testify. Indeed it sanctioned the use of examiners and subordinates for this purpose. See 298 U.S. at 481. See 2 Davis, *Administrative Law Treatise*, § 11.02 (1958).

Moreover, the nature of representation proceedings is such that they do not require the "full panoply of procedural protections." *Brotherhood of Railway Clerks* v. *Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 667. In *Hannah* v. *Larche*, 363 U.S. 420, 440, 442, rehearing denied, 364 U.S. 855, this Court recognized that "the requirements of due process * * * vary with the type of proceeding involved. * * * Whether the Constitution requires that

a particular right obtain in a specific proceeding depends upon * * * [t]he nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding." As this Court noted in *Inland Empire District Council* v. *Millis*, 325 U.S. 697, 706, a representation proceeding is "not technical. It is an 'investigation,' essentially informal, not adversary. The investigation is not required to take any particular form or confined to the hearing." See also, *Foreman & Clark, Inc.* v. *National Labor Relations Board*, 215 F. 2d 396, 408 (C.A. 9), certiorari denied, 348 U.S. 887; *National Labor Relations Board* v. *Fresh'nd-Aire Co.*, 226 F. 2d 737, 740–741 (C.A. 7); *National Labor Relations Board* v. *Botany Worsted Mills*, 133 F. 2d 876, 882 (C.A. 3).[4] As Judge Friendly pointed out in his opinion below (Pet. App. A 9): "There is much reason why a representation hearing should not have to be of the trial type. What is likely to be the prime issue, 'whether * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof,' * * * is more nearly 'legislative' than 'adjudicative' * * *."[5]

[4] In recognition of the informal, investigatory nature of representation proceedings, those proceedings are specifically exempted from the formal hearing requirements of the Administrative Procedure Act (see 5 U.S.C. 1004(c)), including the requirement which calls for a hearing officer's report except where "due and timely execution of [the agency's] functions" requires otherwise (5 U.S.C. 1007(a)).

[5] To the extent that questions of credibility are involved in a representation proceeding, they are most likely to arise, not in the pre-election hearing which, as noted above, is primarily

Petitioner's assertion that there is a conflict in the circuits concerning the necessity of having the hearing officer pass on the issues of credibility is incorrect. Petitioner relies on *S. Buchsbaum & Co.* v. *Federal Trade Commission*, 153 F 2d 85, as being in conflict with the decision below. However, the Seventh Circuit's judgment in *Buchsbaum* was vacated by this Court on the filing of a waiver of error. 328 U.S. 818. Thus, that opinion has no precedential value and cannot give rise to a conflict. Moreover, the *Buchsbaum* case involved an administrative proceeding which resulted in a cease-and-desist order that had an immediate and direct impact upon the company, whereas the present proceeding involves merely the certification of a bargaining representative—a preliminary step in the effectuation of an employer's statutory duty to bargain.

2. Since the constitutional issue which petitioner raised was plainly insubstantial, the refusal to convene a three-judge district court pursuant to 28 U.S.C. 2282 was proper. See *Ex parte Poresky*, 290 U.S. 30; *California Water Service Co.* v. *City of*

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concerned with determining the appropriate bargaining unit, but in the post-election investigation of objections which may have been filed to the election. The Board's rules provide for a post-election hearing, together with a "report resolving questions of credibility," where the objections raise "substantial and material factual issues." Rules and Regulations of the National Labor Relations Board, Series 8, as amended, 29 C.F.R. Sec. 102.69 (c), (d), and (e). See, in addition to the cases cited by petitioner (Pet. 11), *National Labor Relations Board* v. *O.K. Van Storage Inc.*, 297 F. 2d 74, 76 (C.A. 5); *Rockwell Mfg. Co.* v. *National Labor Relations Board*, 330 F. 2d 795 (C.A. 7), certiorari denied, 379 U.S. 890.

Redding, 304 U.S. 252, 254–255; and other cases cited by the court of appeals (Pet. App. A 2–3).

CONCLUSION

The petition for a writ of certiorari, and the alternative motion for leave to file a petition for a writ of mandamus, should both be denied.*

Respectfully submitted,

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JULY 1967.

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*Apart from the considerations already advanced, the extraordinary writ of mandamus would be inappropriate for the additional reason that petitioner may utilize the normal procedure for review by certiorari—as it is doing.

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